RECORD
AND
BRIEF

No. 15-1491

In The
Supreme Court of the United States

BASIL J. MUSNUFF,

Petitioner,

v.

LEROY HAEGER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

A divided Ninth Circuit panel held that a district court may treat judge-imposed sanctions as "compensatory" – and thus deny the sanctioned party significant procedural protections applicable to punitive sanctions – even though the sanctions are not tailored to the harm suffered by the complaining party. Rather than defend this erroneous holding on the merits, respondents try to rewrite it, arguing that the Ninth Circuit ultimately concluded that the sanction imposed on petitioner *was* tailored to the harm that respondents suffered. But the record flatly contradicts that view. To start with, the district court openly admitted that it would not and could not tailor the sanction to the harm caused by the sanctioned conduct, declaring instead that it had no obligation to do so because the conduct was "truly egregious" and petitioner "must now pay the price." App. 172, 177. To make its position even clearer, the district court fashioned an alternative (and considerably less onerous) sanction as a contingency "in the event a direct linkage between the misconduct and the harm is required." App. 65.

For its part, the Ninth Circuit then affirmed the larger sanction without modification, stating that, under this Court's decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), federal courts are free to impose sanctions without tailoring the sanction to resulting harm – and without full procedural safeguards – if the sanction is based upon "the frequency and severity of . . . abuses of the judicial system and the resulting need to ensure that such abuses were not repeated." App.

34-35 (quoting *Chambers*, 501 U.S. at 57). As a result, petitioner was subjected to an enormous sanction that was punitive in every way but name, while being denied the procedural rights that the Constitution explicitly provides to persons faced with criminal punishment. That distortion of the proper line between civil and criminal sanctions merits review by this Court.

The Ninth Circuit erred a second time in holding that federal courts can use their inherent power to circumvent vital notice requirements contained in the federal rules. Respondents endorse this expansion of judicial power, arguing that the federal rules are "not the exclusive means for imposing sanctions for bad faith responses to [discovery requests]." Brief in Opp. at 13. But that argument is aimed at a straw man. As the petition makes clear, petitioner does not claim that federal courts must act according to the federal rules or not at all: the point is simply that, when imposing sanctions pursuant to their inherent power, federal courts may not abandon principles of fair notice that are fundamental to the proper treatment of litigants. No attorney litigating in federal court would reasonably expect to be sanctioned for withholding discovery material that he had not been ordered to produce, *see* Fed. R. Civ. P. 37(b)(2), and federal courts should not have the power, inherent or not, to dispense with that essential precondition. That unilateral expansion of judicial authority likewise warrants this Court's review.

I. Respondents Incorrectly Assert That the Courts Below Imposed Sanctions Consistent with the Rule That Compensatory Sanctions Must Be Tailored to the Harm Suffered, a Rule Respondents Do Not Contest.

The first question presented in this case is whether a federal court may treat a sanction as "compensatory" – and thus deny the sanctioned party the added procedural protections applicable to punitive sanctions – even though the sanction is not tailored to harm suffered by the opposing party. The correct answer is, and should be, no. *See, e.g.*, *Lightspeed Media Corp. v. Smith*, ___ F.3d ___, No. 15-2440, 2016 WL 3905605, at *6 (7th Cir. July 19, 2016) (holding that sanction for contempt was punitive rather than compensatory because the sanction "was an unconditional fine that did not reflect actual costs caused by the attorney's conduct"). Untailored sanctions are not "compensatory" in any true sense of the term, *see* Petition at 15, and federal courts should not be able to deprive litigants and their attorneys of full due process just by declaring that they are.

This rule does not threaten the availability of sanctions in response to bad faith conduct. A federal court may impose untailored sanctions if it accords the accused party or attorney the protections accorded to criminal defendants, or it may impose "compensatory" sanctions – properly tailored to the harm caused – without extending those protections. What it cannot do is what the district court did here: impose punitive

sanctions without allowing the sanctioned person the benefit of full criminal safeguards.

Respondents do not take issue with this point. Instead, they seek to recast the decisions below, claiming that both the district court and the Ninth Circuit found that the sanction here *was* tailored to harm suffered by respondents. Brief in Opp. at 10-12. That is simply not so. Relying on a misreading of *Chambers*, both of the courts below concluded that federal courts could disregard the tailoring requirement "when the sanctionable conduct rises to a truly egregious level," App. 176 (district court), or when the court purports to base its sanction on the "frequency and severity of [the party]'s abuses of the judicial system." App. 34 (Ninth Circuit), quoting *Chambers*, 501 U.S. at 57.[1] Obviously, neither court would have felt compelled to craft a non-tailoring exception for extraordinary behavior if the sanctions were tailored to the harm caused.

The district court, in fact, made clear that it was not tailoring – indeed, could not tailor – its sanction to specific harm suffered by respondents. After acknowledging that "compensatory" sanctions "*usually* must be premised" on a "direct causal link between the

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[1] The courts below created this exception for "truly egregious" conduct to avoid openly clashing with the Ninth Circuit's earlier ruling that substantial non-compensatory monetary sanctions "are akin to criminal contempt and" require courts to follow "procedures applicable to criminal cases." *Miller v. City of Los Angeles*, 661 F.3d 1024, 1030 (9th Cir. 2011). App. 177-78 (district court describing exception as "attempt" to "reconcile *Chambers* with the Ninth Circuit's recent *Miller* decision"); App. 35 (Ninth Circuit holding that its interpretation of *Chambers* "clearly trumps *Miller*").

sanctionable conduct and the alleged harm," App. 177, the district court explained that "it would be impossible to draw the precise causal connections between the misconduct and the fees Plaintiffs incurred," App. 170, and it would be "impossible to point to precise causal links," App. 191. Having reached that conclusion, rather than pursue a significantly narrower range of tailored compensatory sanctions or seek broader punitive sanctions (and provide the petitioner with the attendant procedural protections), the court relied on its misinterpretation of *Chambers* to fashion an exception to the tailoring requirement for "truly egregious" conduct. App. 177.

Furthermore, when calculating the sanction amount, the district court was again unambiguous that the sanctions award it imposed lacked the "causal links between" the sanctionable conduct and plaintiffs' harm. App. 191. To account for the chance that "a direct linkage between the misconduct and harm is required," the district court made an effort at tailoring and calculated a significantly reduced "contingent award" by subtracting fees and costs "for harm not directly linked to the misconduct." App. 65, 71. The district court did not apply the reduction, however, concluding that the sanction should "shift all the fees and costs incurred" in the years after Goodyear's served supplemental discovery responses. App. 84.

The Ninth Circuit then affirmed the untailored sanction in its entirety. In doing so, it expressly rejected petitioner's argument that the district court was required to limit the sanction to the harm suffered by

respondents. Although the required level of procedural protections (i.e., whether the sanction was "punitive" or "compensatory") was not at issue in *Chambers*, the Ninth Circuit clung to its view that in *Chambers* this court authorized sanctions without regard to the harm caused based on a court's inherent power to deter the "frequency and severity of . . . abuses of the judicial system." App. 35-36 (quoting *Chambers*, 501 U.S. at 57).

Respondents turn a blind eye to this history, asserting that the Ninth Circuit expressly found that the causation element had been satisfied in this case when the court "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded." Brief in Opp. at 11 (quoting App. 33) (emphasis added by respondents). But this argument only highlights the problems with the Ninth Circuit's decision. To treat a sanction as "compensatory" – with the loss of procedural protections that such a designation entails – it is not enough for a federal court to find that the sanctioned conduct caused *some* harm to a party: virtually any conduct deserving of sanctions will do that, including (and perhaps especially) conduct that is subject to punitive sanctions. What distinguishes compensatory sanctions from punitive sanctions is the fact that truly compensatory sanctions are specifically tailored to, *and limited by*, the harm that the conduct caused. The Ninth Circuit could not possibly have "found that the causation element had been satisfied" on that basis because the district court explicitly said that the sanction it imposed was *not* so

limited. App. 170 (finding that the court could not "separate the fees incurred due to legitimate activity from [those] incurred due to" sanctionable conduct).

Nor did the Ninth Circuit properly identify a "link . . . between the harm caused and the compensatory sanctions awarded." App. 33. Indeed, in attempting to draw such a link themselves, respondents effectively refute their own argument. As they point out (at 12-13), the district court did not stop at setting a single amount for the sanction against petitioner. To the contrary, having imposed one sanction, the court went on to calculate a second (conditional) amount in case it was determined on appeal that compensatory sanctions must be limited to the amount of harm that was actually caused. App. 65. Given that dual approach, it is illogical for respondents to claim that the first, undiminished, sanction was itself tailored to the harm suffered by respondents. Were that the case, there would have been no reason to establish a lesser figure to accommodate that more demanding (and correct) standard. And it was the greater of the two sanctions that the Ninth Circuit subsequently affirmed.

To color their presentation, respondents devote significant space to petitioner's "egregious misconduct," relying on a series of findings made by the district judge. Brief in Opp. at 6, 16-17. At no point, however, do respondents acknowledge that the cited findings were 1) the outcome of a hearing *without* the protections afforded by an independent prosecutor, trial by jury, or application of the beyond-a-reasonable-doubt standard, and 2) were made by a judge who had

herself initiated the effort to impose a sanction on petitioner. (Respondents had sought sanctions only against petitioner's client.) Furthermore, it is noteworthy that respondents' recitation places far more weight on the blameworthiness of the conduct in question than on the extent of harm supposedly caused by the conduct. If anything, that emphasis tends to confirm that the objective of the sanction was to punish petitioner – to make petitioner "pay the price," App. 172 – not to compensate respondents.

Finally, respondents rely on a purported concession by petitioner "that most of the fees and costs awarded to [respondents] – all but $722,406.52 – *are* causally linked to the sanctionees' misconduct." Brief in Opp. at 12. But, to state the obvious, the fact that part of a sanction might be compensatory does not mean that the court can use the legitimate portion of the sanction as a launching pad to impose *additional* (and thus, by definition, punitive) sanctions without complying with constitutionally required procedures. Indeed, respondents' in-for-a-penny-in-for-a-pound theory would provide a blueprint for federal judges to impose substantial punishments in the absence of full protections just by providing some actual redress as well. And, if respondents mean to suggest that the Court need not bother with the excessive sanction here because it cost petitioner – an individual attorney – only $722,406.52, they are taking the concept of *de minimis* injury to a previously uncharted level.

In short, by allowing the district court to impose a criminal sanction in the guise of a civil one, the Ninth

Circuit wrongly denied petitioner the procedural protections to which he was entitled. Respondents do not even attempt to defend that decision on the merits, and this Court should grant certiorari to review it.

II. Respondents' Defense of the Ninth Circuit's Use of Inherent Authority Confirms That the Decision Leaves Courts Unconstrained by the Discovery Rules.

The Ninth Circuit made matters even worse by approving the district court's use of its inherent power to impose a sanction on petitioner. Respondents seemingly concede that, under Rule 37 of the Federal Rules of Civil Procedure, a federal court cannot impose a sanction on an attorney for failure to produce discovery materials unless the court first enters an order compelling their production.[2] However, respondents go on to say that the limitations of Rule 37 are beside the point because the federal rules are "not the exclusive means for imposing sanctions for bad faith responses to [discovery requests]." Brief in Opp. at 13. Thus, in their view, federal courts are free to exercise their

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[2] Although Rule 37(c) permits sanctions for a failure to "supplement" discovery responses under Rule 26(e), Rule 37(c) "does not permit sanctions against the party's attorney" like Rule 37(b)(2)(C) does. *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 141 (3d Cir. 2009). "Except where Rule 37(c) applies, Rule 37(b) usually has no application if there has not been a court order." 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2289 (3d ed.).

inherent power without regard for the requirements of notice embodied in the federal rules.

This argument, however, goes too far. It is true, as *Chambers* establishes, that federal courts have inherent power to manage proceedings before them and that they may exercise that power without strict adherence to the letter of the federal rules. 501 U.S. at 50-51. But it is not true that federal courts may invoke their inherent power without taking account of procedures that protect litigants and their attorneys against judicial unfairness and surprise. Otherwise, the federal rules would amount to little more than a set of mere guidelines that courts could ignore. At the very least, a federal court must assure that resort to its inherent power does not amount to an after-the-fact reordering of the ground rules under which the parties had previously been operating. *See Chambers*, 501 U.S. at 50 (when "bad-faith conduct . . . could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power").

That basic principle applies with full force here. As set forth in the petition, Rule 37 not only requires that a district court issue an order before a sanction can be imposed on a party's attorney for nonproduction of documents, it does so for a particular, and important, reason, i.e., to give the litigant or its attorney formal notice that the court has rejected its objection to producing previously requested documents or other material. Petition at 22-23.

Respondents argue (at 14) that prior notice is not always a precondition for sanctions, asserting that a

federal court can impose sanctions without notice under Rule 26(g). But hypotheticals under Rule 26(g) miss the point: whether under Rule 26(g) or Rule 37, "[t]he sanctioning process must comport with due process requirements." Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment. And when it comes to a "fail[ure] to produce documents . . . as requested under Rule 34," Rule 37(a)(3)(B)(iv) and (b)(2)(C) set out the process that is due before a court may order "the attorney . . . to pay the reasonable expenses, including attorney's fees, caused by the failure." Fed. R. Civ. P. 37(b)(2)(C); *see* Petition at 22.

Respondents' other main argument (at 16-17) is that much of petitioner's conduct was beyond the scope of Rule 37. This is a dubious assertion given that the district court's description of "sanctionable behavior" revolves around the nonproduction of certain test data and statements made regarding the existence and availability of that same test data. App. 179-90. Even if respondents' characterization were correct, however, it would not advance their cause. As this Court admonished in *Chambers*, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." 501 U.S. at 44. *See also Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) (warning that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion"). This Court's cautionary instructions are particularly apt with respect to discovery disputes, where the parties and their attorneys work within an extensive – and, to the attorneys, highly

familiar – set of procedural rules, which allow for objections and counter-objections. If the rules do not address specific behavior, as respondents contend here, a federal court should not simply invent its own rules to cover what was not covered, thereby tilting the balance in favor of one party against another. Indeed, it is especially inappropriate for a court to do so when, as here, the party subject to possible sanctions can no longer alter his behavior and comply. Changing the rules after the game is over is the paradigm of unfair treatment.

The Ninth Circuit failed to apply these principles to curb the district court's abuse of its inherent power. That issue independently warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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